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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Petitioner

v.

UNITED STATES POSTAL SERVICE,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where the parties to a collective bargaining agreement have submitted the question of arbitrability of a grievance to an arbitrator who has authority under the parties' agreement to make a final and binding determination of arbitrability, must a court reviewing the arbitration award apply the deferential standard of review set forth in *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 36 (1988), on the question of arbitrability, or may the court make an independent evaluation of the arbitrability of the grievance.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner American Postal Workers Union, AFL-CIO (APWU), respectfully petitions this Court to issue a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit in *United States Postal Service v. American Postal Workers Union, AFL-CIO*, Fifth Circuit No. 90-1562.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 922 F.2d 256. It is reproduced at pp. 1a-9a of the Appendix to this petition ("App."). The Memorandum Opinion of the District Court is unreported. It is reproduced at App. 10a-14a. The arbitration award at issue here is unreported and is reproduced at App. 15a-24a.

JURISDICTION

The decision of the Court of Appeals and its judgment (App. 1a-9a) were issued on January 28, 1991. A timely petition for rehearing was denied on February 26, 1991 (App. 25a). On April 29, 1991, Mr. Justice Scalia entered an order extending the time for filing this petition to June 21, 1991. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved in this case is 39 U.S.C. § 1208(b) which is set forth in the Appendix to this petition at 26a.

STATEMENT OF THE CASE

Petitioner, the American Postal Workers Union, AFL-CIO ("APWU") is a labor organization representing employees of Respondent United States Postal Service ("USPS" or "Postal Service"). The USPS and the APWU are parties to a nationwide collective bargaining agreement (hereinafter the "National Agreement"). The grievance at issue in this case arose under the 1984-1987 National Agreement.

The National Agreement contains a broad arbitration provision and broad definition of a grievance. Virtually any dispute between the parties which arises under the National Agreement is subject to the grievance-arbitration procedure.[1]

The National Agreement expressly provides that issues of arbitrability may be resolved by the arbitrator. It further provides, without qualification, that such decisions are to be "final and binding." Article 15, Section 4.A(9) thus states:

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[1] Pertinent provisions of the National Agreement and contractually mandated regulations are reprinted in an Appendix to this Brief, at 27a-29a.

> . . . . Any dispute as to arbitrability may be submitted to the arbitrator and be determined by such arbitrator. The arbitrator's determination shall be final and binding.

With regard to the merits of an arbitration decision, Article 15, Section 4.A(6) provides:

> All decisions of an arbitrator will be final and binding. All decisions of arbitrators shall be limited to the terms and provisions of this Agreement, and in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator.

Under the National Agreement, the Employer is required to adhere to the Federal Employee's Compensation Act (FECA), subchapter I of Chapter 81 of Title 5 of the U.S. Code, and to promulgate binding regulations in compliance with that Act. National Agreement Article 21; App. 28a. The Employer's regulations promulgated pursuant to Article 21 of the Agreement are included in Part 540 of the Postal Service Employee and Labor Relations Manual ("ELM"). These provisions of the ELM are incorporated by reference into the National Agreement by virtue of Article 19 of the National Agreement. App. 28a.

The ELM provisions unambiguously require the Postal Service to grant an employee injured on the job leave without pay for up to one year from the date workers compensation commences. ELM Section 545.91, App. 29a. The employee must also be retained on the employment rolls during this time. ELM Section 545.93; App. 29a. If the employee recovers within one year, it is the obligation of the Postal Service to permit the employee to "resume employment in the former or equivalent position." ELM Section 546.121; App. 29a. FECA and the Postal Service's implementing regulations in the ELM are applicable to both probationary and permanent employees. App. 21a.

The discharged employee whose grievance is at issue in this case, Darel Smith, was hired to work as a Distribution Clerk at the Fort Worth, Texas post office. Approximately midway through Mr. Smith's 90-day probationary period, he was injured in a work-related automobile accident and was placed on paid leave in accordance with the ELM requirements. When Mr. Smith returned to work after his recovery, still during his probationary period, he was given a termination notice that was to take effect immediately. The notice stated: "[t]his termination of your employment is due to your unsatisfactory performance as a Postal employee." App. 17a.[2]

The APWU filed a grievance on behalf of Mr. Smith, contending that even as a probationary employee Mr. Smith was entitled by the National Agreement to be reinstated following recovery from his on-the-job injury. As a remedy for the alleged violation of Mr. Smith's rights, the APWU asked that Mr. Smith be reinstated with full seniority status and compensated for all lost wages. App. 18a. The grievance was appealed through the grievance procedure of the National Agreement to arbitration.

In response to the grievance, the Postal Service took the position that the grievance could not be heard because the termination occurred during Mr. Smith's probationary period. App. 18a. The Postal Service further asserted that, while it had not made a decision to termi-

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[2] Mr. Smith had received a customary 30-day evaluation. App. 16a. Although his supervisor rated Mr. Smith's performance as less than satisfactory in several respects, the supervisor did not recommend that Mr. Smith be terminated. Rather, Mr. Smith was assigned to further training. Shortly after the 30-day evaluation, the supervisor issued a memorandum to higher management requesting that Mr. Smith be immediately terminated for failing to follow instructions on a particular day. No action was taken on this recommendation prior to the time Mr. Smith suffered his injury and was placed on leave.

nate Mr. Smith at the time of his 30-day evaluation, it did make such a determination thereafter, although it had not communicated that decision to Mr. Smith until he attempted to return from his on-the-job injury. App. 19a, 20a.

When the grievance reached arbitration, the parties submitted two issues to the Arbitrator:

1. Whether the instant grievance is arbitrable?
2. Whether the grievant's termination violated the National Agreement and/or federal law, and if so, what is the remedy?

App. 16a.

In asserting that the grievance filed on behalf of Mr. Smith was not arbitrable, the employer relied upon Article 12, Section 1, of the National Agreement which states, in pertinent part:

> The probationary period for a new employee shall be ninety (90) calendar days. The Employer shall have the right to separate from its employ any probationary employee at any time during the probationary period and these probationary employees shall not be permitted access to the grievance procedure in relation thereto. . . .

App. 27a.

The Union contended that Mr. Smith was unqualifiedly entitled to reinstatement following recovery from his on-the-job injury, that he was entitled to continuous credit for employment service to the date of his reinstatement, and that he should, therefore, be reinstated as a non-probationary employee.

The Arbitrator found the grievance to be arbitrable, concluded that the termination violated the National Agreement, and ordered the USPS to reinstate Mr. Smith as a probationary employee.

The Arbitrator's Decision

In his ruling that Mr. Smith was entitled to be reinstated by way of the grievance procedure, the Arbitrator acknowledged that "[t]here can be no serious question about the right of the Postal Service to issue a removal notice any time within the first 90 days of a person's employment. That is to say, Management may make this decision and take this action without having to prove that it had 'just cause' as this term is used in Articles 3 and 16 [of the National Agreement]." App. 21a. The Arbitrator found, however, that under the National Agreement all postal employees, including probationary employees, are contractually entitled to assert rights protected by FECA and the ELM regulations since "[The ELM provision] makes no distinction between a permanent employee and one that is on probation." App. 21a.

The Arbitrator concluded that the contractual restoration rights provided to employees under the ELM apply whenever the employee's removal is "the result of, *or substantially related to,* the compensable injury," and that "in essence, . . . the employee should be reinstated unless it can be said with reasonable assurance that the [employee's] absence due to on-the-job injury had nothing whatever to do with Management's decision to initiate the removal action." App. 22a. (Emphasis in original.)[3]

In response to the employer's contention that its right to terminate employees during their probationary period foreclosed an arbitral remedy, the Arbitrator noted that the USPS had not exercised its right to issue a removal

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[3] The Arbitrator buttressed his reading of the ELM by reference to *Roche v. United States Postal Service*, 828 F.2d 1555, 1557 (Fed. Cir. 1987) in which the Court ruled that employees are entitled to appeal the denial of statutory restoration rights irrespective of their probationary status if their removal was substantially related to a compensable injury.

notice prior to Mr. Smith's injury. The Arbitrator observed that while Mr. Smith's 30-day evaluation had been less than satisfactory, "the fact is, he was not discharged." Accordingly, the Arbitrator found that it "must be assumed that management held out hope that he would respond to training and indoctrination," and that prior to his injury leave "the decision had not been made, namely, that the grievant was unwilling or unable to make the necessary improvement." App. 23a.[4]

The Arbitrator ruled that, on these facts, it was reasonable to conclude that Mr. Smith "was trying to meet management's standards of performance but was unable to demonstrate this because he was absent due to compensable injury" and accordingly was entitled to reinstatement under the contract inasmuch as his separation "was the result of, or substantially related to, the compensable injury." App. 23a.

The Arbitrator rejected the Union's request that Mr. Smith be reinstated as a non-probationary employee, ruling instead that the USPS was required to reinstate Mr. Smith in a probationary status and "to afford him the remainder of his probationary period to qualify as a permanent employee." App. 15a.

The Decision of the District Court

The Postal Service brought suit in the United States District Court for the Northern District of Texas, seeking an order setting aside the arbitrator's award; the APWU counterclaimed for enforcement of the award.

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[4] The Arbitrator discounted the less than favorable 30-day evaluation of Mr. Smith, noting the uncontroverted evidence that "it is almost routine to give probationary employees unsatisfactory ratings in order to motivate them and to convince them that management's standards are high." App. 23a.

Jurisdiction for the suit was based on Section 1208(b) of the Postal Reorganization Act, 39 U.S.C. § 1208(b).[5]

On cross-motions for summary judgment, the district court granted judgment in favor of the Postal Service, vacating the arbitrator's award. In a brief opinion, the court observed that the first issue to be resolved was "whether the Arbitrator exceeded his authority." App. 11a. The court ruled that "[a]lthough the Arbitrator may have implicitly considered the issue of arbitrability, his decision is not absolutely immune from judicial review as defendants suggest. If the arbitrator exceeded his authority under the collective bargaining agreement, the Court may set aside the award. *Container Products v. United Steelworkers*, 873 F.2d 818, 820 (5th Cir. 1989)." App. 12a. In the opinion of the district court, "[u]nder the clear language of the National Agreement, probationary employees are not permitted access to the grievance procedure in relation to a termination within the

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[5] Section 1208(b) of the Postal Reorganization Act (PRA), 39 U.S.C. § 1208(b), provides:

> (b) Suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy.

This provision is substantively identical to Section 301(a) of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185, which provides:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

It is well settled that these provisions are substantively the same. *See Bowen v. United States Postal Service*, 459 U.S. 212, 232 n.2 (1983) (White, J., dissenting); *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 823 F.2d 466, 468 (11th Cir. 1987).

probationary period. Article 12, Section 1.A. The arbitrator clearly exceeded his authority under the clear and unequivocal language of the collective bargaining agreement." App. 12a.

The Decision of the Court of Appeals

On appeal, the Fifth Circuit affirmed the judgment of the District Court. App. 9a. Notwithstanding the arbitrator's factual finding (App. 23a) that Mr. Smith's discharge was "the result of or substantially related to the compensable injury," the Court of Appeals stated that "the Postal Service fired Smith because of his 'unsatisfactory performance as a postal employee.'" App. 2a. After an analysis of the pertinent provisions of the collective bargaining agreement, the Court concluded (App. 6a):

> We agree with the Postal Service that even when, as in this case, a probationary employee alleges that his termination violates Articles 19 and 21 of the National Agreement, Article 12 of that Agreement clearly denies probationary employees any right to resort to grievance and arbitration procedures.

In reaching this conclusion, the Court of Appeals invoked what it characterized as "well-established principles of construction [which] require that the specific trump the general provision" (footnote omitted). In the Court's view, even the meritorious assertion that Mr. Smith was entitled to reinstatement under Articles 19 and 21 of the National Agreement could not "confer on probationary employees the right to arbitration on issues concerning these articles that Article 12 expressly denies them." App. 2a.

With regard to Article 15.A.4(9) of the National Agreement, which provides that an arbitrator's decision on the issue of arbitrability "shall be final and binding," the Court of Appeals held that "[t]he same principle of construction [that the specific trump the general pro-

vision] also applies to the conflict between Article 12 and Article 15.A.4(9). . . ." App. 8a. Notwithstanding the fact that the parties submitted the issue of arbitrability to the arbitrator (see App. 16a, 18a), the Court of Appeals held (App. 8a):

> Article 12 does not permit the arbitrator ever to reach the question of arbitrability when the dismissal at issue involves probationary employees. When the arbitrator does so, he clearly exceeds his authority under the National Agreement.

Accordingly, the Court of Appeals affirmed the District Court judgment with the concluding observation that "the arbitrator exceeded his authority under the clear and unequivocal language of the National Agreement." App. 9a.

REASONS FOR GRANTING THE WRIT

This Court has emphasized for more than 30 years that "the courts play only a limited role when asked to review the decision of an arbitrator. The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 36 (1988). "The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *Id.* (quoting *Steelworkers v. Enterprises Wheel & Car Corp.*, 363 U.S. 593, 596 (1960)).

Equally well settled is the principle that absent a "clear and unmistakable" agreement otherwise, "the question of arbitrability—whether a collective bargaining agreement creates a duty for the parties to arbitrate the particular grievance— . . . is to be decided by the court not by the arbitrator" (citation omitted). *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 649 (1986).

The issue that has not been settled by this Court, and on which the Circuits are now in disagreement, is the proper standard of judicial review to be applied by the courts where the parties *have* contractually committed the question of arbitrability ot the arbitrator, and the arbitrator's decision on the merits of the arbitrability issue is the subject of a motion to vacate or confirm the arbitrator's award.

I. THE DECISION BELOW SQUARELY CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS

A. The majority of the Courts of Appeals are in accord that in those cases in which the parties have agreed to submit the question of arbitrability to an arbitrator,

> review is subject to the same highly deferential standard we employ in reviewing arbitrators' rulings on the merits. We will not vacate an arbitrator's arbitrability decision unless it cannot rationally be derived from the collective bargaining agreement. See *United Steelworkers v. American Smelting, etc.*, 648 F.2d 863, 867 (3d Cir.), *cert. denied*, 454 U.S. 1931 (1981).

Pennsylvania Power Company v. Local 272, 886 F.2d 46, 48 (3d Cir. 1989). *Accord, G K MGT v. Hotel Employees Local 279*, 930 F.2d 301 (3d Cir. 1991).

Thus, the Sixth Circuit has consistently held that "an arbitrator's decision of the issue of arbitrability [is] not subject to independent judicial review. . . . '[T]he scope of the arbitrator's authority is itself a question of contract interpretation that the parties have delegated to the arbitrator.' (quoting *W. R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 765 (1983))." *Vic Wertz Distributing v. Teamsters Local 1038*, 898 F.2d 1136, 1139 (6th Cir. 1989). Accordingly, " 'the presumption of authority that attaches to an arbitrator's award applies with equal force to his decision that his award is within the

submission.' (quoting *Johnston Boiler Co. v. Local Lodge No. 893*, 753 F.2d 40, 43 (6th Cir. 1985))." *Id.*[6]

This is also the long-standing rule in the Ninth Circuit, where, in the leading case *George Day Construction Co., Inc. v. Carpenters Local 354*, 722 F.2d 1471, 1475 (9th Cir. 1984), the court held that when the parties consent to allow an arbitrator to decide the entire controversy, including the question of arbitrability

> [W]e are not at liberty to substitute our own view in place of the arbitrator's regardless of what our view might be of the correctness of the arbitral decision. *W. R. Grace & Co.*, 461 U.S. 757, 103 S.Ct. at 2182. The parties have delegated that decision to the arbitrator and we may not 'second-guess' him. *Id.*[7]

The Eighth Circuit has, likewise, concluded that the narrow standard of review prescribed by *Paperworkers v. Misco, supra*, must be applied to an arbitrator's determination of arbitrability.

> Once an issue is properly before the arbitrator, the standard of judicial review for the decision is deferential: if the award "draws its essence from the collective bargaining agreement" then it must be

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[6] Accord, *Interstate Brands Corporation, Butternut Bread Division v. Teamsters, Local 135*, 909 F.2d 885, 890 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 1104 (1991); *Lattimer-Stevens Co. v. District 27*, 913 F.2d 1166, 1170 (6th Cir. 1990) ("[T]he extraordinary deference given to an arbitrator's ultimate decision on the merits applies equally to an arbitrator's decision that the parties have indeed submitted a particular issue for arbitration.").

[7] Accord, *United Food and Commercial Workers v. Lucky Stores, Inc.*, 806 F.2d 1385, 1386 (9th Cir. 1986); *District Council of Painters v. Kashak*, 774 F.2d 985, 989 (9th Cir. 1985). And, as in the Third and Sixth Circuits the Ninth Circuit has held that "an arbitrator's interpretation of the scope of the issues submitted to him is entitled to the same deference accorded his interpretation of the collective bargaining agreement." *Pack Concrete, Inc. v. Cunningham*, 866 F.2d 283, 285 (9th Cir. 1989).

> enforced [citation omitted]. This deferential standard applies equally to an arbitrator's award arising not merely out of a collective bargaining agreement, but also from the parties independent submission of questions ordinarily resolved by the courts. [Citation omitted] Because we cannot say the arbitrator's decision [on arbitrability] did not take its essence from the parties agreement, we hold the district court correctly upheld the arbitrator's decision to reach the merits of the issue.

Franklin Electric Co. v. UAW, 886 F.2d 188, 192 (1989).

B. The First Circuit has adopted an even more deferential standard when reviewing an arbitrator's decision on arbitrability in those cases in which the parties have submitted the issue to the arbitrator. In *Berklee College of Music v. Local 4412*, 858 F.2d 31, 34 (1st Cir. 1988) cert. denied 110 S.Ct. 53 (1989), the court deferred to an arbitrator's determination that an apparently unambiguous contractual time limitation on the filing of grievances could be overlooked under appropriate circumstances. As the court explained:

> Whether we would find these arguments convincing were it up to us to interpret the contract is beside the point. The question is whether these arguments make the arbitrator's interpretation plausible. We can imagine some judges or arbitrators accepting these arguments (without stretching the imagination very far). That being so, we must uphold the arbitrator's determination. *Misco, supra.*

The Seventh Circuit's decision in *Jones Dairy Farm v. Local B-1236*, 760 F.2d 173 (7th Cir.), *cert. denied*, 474 U.S. 848 (1985), suggests that it takes a similar approach to that of the First Circuit. In that case, the court refused to permit the employer to obtain judicial review of the arbitrator's decision on arbitrability because the employer had "voluntarily and unreservedly" submitted the issue of arbitrability to the arbitrator. *Id.* at 175. The court went on to explain that:

> If people want a question of law resolved by an arbitrator rather than a judge, there is nothing to stop them. It would be odd if having consented to have the arbitrator decide what its legal rights to contract out work were, Jones Dairy Farm could then have the same question redetermined by two courts—the district court and this court. We hold it could not, and therefore that the judgment must be reversed with instructions to enforce the arbitrator's award.

Id.[8] According to the Seventh Circuit, once an arbitrator has been given the authority to decide an issue, they "cannot complain that the arbitrator exceeded his authority" in deciding the issue. *Id.*[9]

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[8] The court in *Kraemer & Sons v. Local 695*, 132 LRRM 2524 ,W.D. Wis. 1986), read *Jones Dairy Farm* even more broadly, stating that "*Jones Dairy Farm* dictates that the question of arbitrability decided by the arbitrator is conclusive and may not be overturned by this court." *Id.* at 2527.

[9] The courts have further held that such an agreement can also be implied from the parties' conduct. By submitting an issue to arbitration a party may be held to have waived objection to the arbitrator's authority, or impliedly to have agreed to abide by the decision of the arbitrator on that issue. *Local 36 v. Atlas Air Conditioning Co.*, 926 F.2d 770, 771-772 (8th Cir. 1991); *Van Waters & Rogers, Inc. v. Teamsters Local 70*, 913 F.2d 736, 740-741 (9th Cir. 1990); *Interstate Brands v. Teamsters Local 135*, 909 F.2d 885, 890 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 1104 (1991); *Jones Dairy Farm v. Local 1236*, 760 F.2d 173, 175 (7th Cir.), *cert. denied*, 474 U.S. 845 (1985); *Teamsters Local 764 v. J.H. Merritt & Co.*, 770 F.2d 40, 42 (3d Cir. 1985); *Mobil Oil Corp. v. Independent Oil Workers Union*, 679 F.2d 299 (3d Cir. 1982).

In this regard, the Eighth Circuit places the burden on the party seeking to preserve the issue of arbitrability for review by the courts. In *Local 36 v. Atlas Air Conditioning Co.*, 926 F.2d 770, 771-772 (8th Cir. 1991), that court suggested three alternative methods:

> Atlas could have objected to the arbitrator's authority, refused to argue the arbitrability issue, and proceeded to the merits of the grievance. By making an objection as to jurisdiction and an express reservation of the question on the record,

C. The rule in the Fifth Circuit, cannot be squared with either the majority approach or the approach of the First and Seventh Circuits. As explained by that court in *Container Products, Inc. v. United Steelworkers*, 873 F.2d 818 (5th Cir. 1989), the Fifth Circuit "construe[s] the Supreme Court's language [in *Misco*] as an admonition concerning the merits of the controversy rather than any jurisdictional prerequisites imposed by the arbitration agreement." Thus, the Fifth Circuit in this case observed (App. 4a) that *Misco* requires the court to "pay considerable deference to the *merits* of an arbitrator's award. . . .

> But this court will not enforce an arbitrator's decision on the *merits* if the arbitrator has exceeded his authority under the collective bargaining agreement. *Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 602 (5th Cir. 1989), *cert. denied*, —— U.S. ——, 111 S.Ct. 148, 112 L Ed.2d 114 (1990); *Container Prods., Inc. v. United Steelworkers*, 873 F.2d 818, 820 (5th Cir. 1989). [Emphasis added.] [10]

Atlas would not have lost its defense. Second, Atlas could have sought declaratory or injunctive relief prior to the commencement of arbitration. Finally, Atlas could have notified the St. Louis Board that they refused to arbitrate altogether.

Because none of these routes was followed, the court in *Atlas* held that the employer was foreclosed from asserting non-arbitrability as a defense to a motion to enforce the arbitration award. *Id.*

[10] In *Delta Queen, supra*, the Fifth Circuit reviewed an award on the merits of a discharge grievance and vacated the arbitrator's award ordering reinstatement of the employee. On the suggestion of rehearing *en banc*, four judges dissented from the denial of rehearing, on the ground that by adopting a broad standard of review, the court weakened the important policy of encouraging Alternative Dispute Resolution (ADR) by "turning its back on a developed and effective ADR procedure." *Delta Queen Steamboat Company v. District 2, MEBA*, 897 F.2d 746, 750 (5th Cir. 1990) (Williams, J., with whom Politz, King and Johnson, Circuit Judges, joined, dissenting from the denial of rehearing *en banc*).

In making the determination that the arbitrator had "exceeded his authority under the collective bargaining agreement" in this case, th ecourt below independently interpreted the collective bargaining agreement concluding that "Article 12 [of the National Agreement] does not permit the arbitrator ever to reach the question of arbitrability when the dismissal issue involves probationary employees". App. 8a.

D. The sum of the matter is that in the other Circuits whose decisions are reviewed above, parties who submit the issue of arbitrability to the arbitrator, in addition to the merits of their dispute, are either bound by the arbitrator's decision on arbirability or may obtain review of it only under the narrow, deferential standard set by this Court in *Misco*. As the Eighth Circuit in *Franklin Electric*, *supra*, explained in declining to engage in extensive analysis of the collective bargaining agreement (*id.*):

> Because we are deciding appellant's joint jurisdictional and arbitrability questions based on their voluntary submission to the arbitrator, we will not reach its extensive arguments concerning the limited scope of this CBA. . . . As we noted before, arbitrability is a matter of contract and here both parties by their conduct agreed to arbitrate the issue. A party against whom the award was issued cannot now declare it does not wish to be bound by the arbitrator's decision. See, *e.g.*, *Jones Dairy Farm*, 760 F.2d at 175-176.

The Fifth Circuit, by contrast, makes no effort to recognize, let alone defer to, the aribtrator's contractually delegated authority to decide arbitrability issues. Thus, in this case, the court instead summarily dismissed the broad grant of authority given to the arbitrator under Article 15 of the National Agreement on the basis of its own contractual interpretation that Article 12 constituted

a limitation to the arbiraor's auhoriy that was applicable in all instances.[11]

But the Postal Service and the APWU had by contract agreed that an arbitrator's determination of arbitrability would be final and binding. Under the *Misco* standards, as applied in the majority of circuits, the arbitrator's determination that he had jurisdiction to address the merits of the instant grievance could accordingly only be set aside if it wholly fails to "draw its essence from the collective bargaining agreement." 484 U.S. at 36. "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.* at 38.

In determining that he had jurisdiction in this matter, the arbitrator was plainly "construing the contract." In the arbitrator's view, probationary employees who make a timely return from workers compensation leave have contractual rights to reinstatement. App. 24a. This right exists despite the fact that the contract otherwise denies them the right to contest their dismissal during the probationary period. The arbitrator's conclusion that he had the authority to direct reinstatement as a remedy for the breach of the employee's contractual right is a reasonable means of reconciling the two apparently inconsistent provisions in the collective bargaining agreement. Certainly, it is a "plausible" one. *Berklee College of Music v. Local 4412*, 858 F.2d 31, 34 (1st Cir. 1988), *cert. de-*

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[11] Even if the National Agreement had not expressly authorized the arbitrator to decide this issue, it is clear that under the majority rule of the circuit courts the strict deference standard would be applicable to review of the arbitrator's decision since the parties "unequivocally" and "voluntarily" put the issue before him without reserving the right to *de novo* determination by the court. See cases cited *supra*, n.7.

nied, 110 S.Ct. 53 (1989). Whether a court would have reached the same result is simply "beside the point." *Id.*[12]

The decision below extends a conflict among the circuits that makes the content of important federal labor policy governing the finality of arbitrators' awards dependent upon the situs of the dispute.[13] In the case of the Postal Service, it results in a different standard between circuits in the application of a single National Agreement. By adopting an unduly broad standard of review that abrogates the parties' agreement concerning the authority of arbitrators to determine the arbitrability of the parties' disputes, the court below has weakened the important policy of encouraging private mechanisms for dispute resolution in direct conflict with this Court's teachings in *Paperworkers v. Misco, Inc., supra.*

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[12] We do not suggest that Arbitrator Sherman's decision is a model of clarity, but that is not the standard. As the Court observed in *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960), arbitrators "sit to settle disputes at the plant level—disputes that require for their solution knowledge of custom and practices of a particular factory or of a particular industry as reflected in particular agreements" (footnote omitted). In this case for example, the arbitrator interpreted and applied a Postal Service Manual as part of the parties' contract—as indisputably it is under Article 19. He did so without spelling out what made it so. As APWU officer Thomas Neill explained in his sworn declaration, the Manuals are part of the parties' agreement and are routinely interpreted and applied by arbitrators appointed by the parties under that agreement. App. 5a, n.2. Thus, while the court below concluded that Article 12 is "clear and unequivocal" Arbitrator Sherman, with a far greater knowledge of the parties' agreement reached a different conclusion, as did another arbitrator in *American Postal Workers Union, AFL-CIO v. United States Postal Service*, No. 85-3811 (11th Cir. 1986). See n.13, *infra.*

[13] The Eleventh Circuit made a similar decision in a case which was cited by Respondents in its briefs to the courts below in this case. *American Postal Workers Union v. United States Postal Service*, 11th Cir. No. 85-3811 (1986). The Eleventh Circuit's decision is not officially reported and is therefore considered not to have precedential value under the rules of that court (11th Cir. R. 36-1).

II. THE DECISION BELOW IS INCONSISTENT WITH NATIONAL LABOR POLICY

Section 203(d) of the Labor Management Relations Act of 1947, 29 U.S.C. § 173(d) states:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining ageement. . . .

As this court observed in *Steelworkers v. American Manufacturers Co.*, 363 U.S. 564, 566 (1960), this congressional policy "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play."

As this court also observed, in another of the decisions in the *Steelworkers* trilogy, "[s]ince arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." *Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

Most recently, in *Paperworkers v. Misco, Inc.*, *supra*, at 37 the court stated "[t]he reasons for insulating arbitral decisions from judicial review are grounded in the federal statutes regulating labor-management relations. . . .

> The courts have jurisdiction to enforce collective-bargaining contracts, but where the contract provides grievance and arbitration procedures, those procedures must first be exhausted and courts must order resort to the private settlement mechanisms without dealing with the merits of the dispute. Because the parties have contracted to have disputes settled by an

> arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.

The Fifth Circuit's rule permitting independent judicial review of arbitrators' decisions concerning arbitrability, where the parties have agreed to submit the issue of arbitrability to the arbitrator, frustrates these important policies. In this case, the APWU and the Postal Service have contracted to obtain a "final and binding" determination of arbitrability by an arbitrator they mutually select. The parties submitted the issue of arbitrability to the arbitrator together with the merits of the dispute and obtained the arbitrator's determination that their dispute is arbitrable. Determination by the arbitrator is the "method agreed upon by the parties" in this case. As such, it must be given "full play." As the court observed in *Enterprise Wheel and Car, supra*, the court below had "no business overruling [the arbitrator] because their interpretation of the contract is different from his." 363 U.S. at 599. By doing so, the court below has contravened federal labor policy prohibiting courts from subsituting their own judgments for that of labor arbitrators chosen by their parties to resolve their disputes.

CONCLUSION

For the foregoing reasons, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 90-1562

Summary Calendar

UNITED STATES POSTAL SERVICE,
Plaintiff-Appellee,

v.

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

Jan. 28, 1991

Before GEE, SMITH, and WIENER, Circuit Judges.

WIENER, Circuit Judge:

Defendant-Appellant, the American Postal Workers Union, AFL-CIO (APWU), appeals the summary judgment which the district court granted in favor of plaintiff-appellee, the United States Postal Service (Postal Service). Stating that the arbitrator had clearly exceeded his authority under the terms of the collective bargaining agreement, the district court vacated the award of the arbitrator who had directed that a probationary postal

employee be reinstated. Finding that the arbitrator exceeded his authority, we affirm.

OPERABLE FACTS

The discharged employee, Darel Smith, was hired on March 15, 1986, as a distribution clerk at the Fort Worth, Texas, Post Office. As a new employee, Smith had to serve a 90-day probationary period. On Smith's thirty-day evaluation his supervisor stated that Smith was failing to meet expectations, but he did not recommend that Smith be terminated. In a memo dated April 19, 1986, his supervisor requested that Smith be immediately terminated. The Postal Service had not acted upon that request when during Smith's probationary period, on April 26, 1986, Smith was injured in a work-related automobile accident. As a result of the accident Smith was placed on "compensable leave" pursuant to the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§ 8101 et seq.

On May 15, 1986, while Smith was on compensable leave and less than ninety days after he had entered its employment, the Postal Service fired Smith because of his "unsatisfactory performance as a Postal employee." Smith recovered from his injury and was able to return to work on May 18, 1986.

Contesting Smith's discharge, the APWU filed a grievance pursuant to the collective bargaining agreement (National Agreement) between the Postal Service and the APWU. At arbitration the APWU contended that Smith was fired because of his compensable injury and that his firing violated FECA and postal regulations implementing FECA.[1] The APWU sought to have Smith reinstated with full seniority status (with no further probation) and compensation for all lost wages. In its defense the Postal Service asserted that the arbitrator had

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[1] FECA covers postal employees. *See* 39 U.S.C. § 1005(c) (applying FECA to the Postal Service).

no authority to hear the grievance because the terms of the National Agreement prohibited the union from contesting the discharge of a probationary employee.

The arbitrator addressed two issues: (1) "whether the instant grievance is arbitrable; and (2) whether the grievant's termination violated the National Agreement and/or federal law, and if so, what is the remedy?" Having found the grievance arbitrable, the arbitrator found that the Postal Service had violated the national agreement. He ordered that Smith be reinstated as a probationary employee and be made whole for all financial loss, but determined that Smith was not entitled to full seniority status. Pursuant to Section 1208(b) of the Postal Reorganization Act, 39 U.S.C. § 1208(b), the Postal Service then brought suit to vacate the award. Both parties moved for summary judgment, which by order dated May 16, 1990, the district court granted in the Postal Service's favor. This appeal timely followed.

DISCUSSION

I

Federal law encourages private resolution of labor disputes through arbitration. *See* 29 U.S.C. § 173(d). Employers and unions may, however, limit the discretion of the arbitrator, as the Postal Service and the APWU have done in article 15.4.A.(6) of their National Agreement, which states:

> [a]ll decisions of an arbitrator will be final and binding. All decisions of arbitrators shall be limited to the terms and provisions of this Agreement, and in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator.

On questions of arbitrability article 15.4.A.(9) states:

> [a]ny dispute as to arbitrability may be submitted to the arbitrator and be determined by such ar-

bitrator. The arbitrator's determination shall be final and binding.

To encourage the private resolution of labor disputes, courts pay considerable deference to the merits of an arbitrator's award. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 108 S.Ct. 364, 370, 98 L.Ed. 2d 286 (1987). But this court will not enforce an arbitrator's decision on the merits if the arbitrator has exceeded his authority under the collective bargaining agreement. *Delta Queen Steamboat Co. v. District 2 Marine Eng'rs. Beneficial Ass'n*, 889 F.2d 599, 602 (5th Cir. 1989), *cert. denied*, —— U.S. ——, 111 S.Ct. 148, 112 L.Ed.2d 114 (1990); *Container Prods., Inc. v. United Steelworkers*, 873 F.2d 818, 820 (5th Cir. 1989). We have stated that "[w]here the arbitrator exceeds the express limitations of his contractual mandate, judicial deference is at an end." *Delta Queen*, 889 F.2d at 602. The crucial issue in this case is whether the arbitrator had jurisdiction to hear Smith's grievance.

II

The Postal Service argues that the National Agreement unambiguously denies a probationary employee access to the grievance procedure to challenge his dismissal from employment. Article 12.1.A. states in relevant part:

> The probationary period for a new employee shall be ninety (90) days. The Employer shall have the right to separate from its employ any probationary employee at any time during the probationary period and these *probationary employees shall not be permitted access to the grievance procedure in relation thereto.*

(emphasis added).

The APWU, on the other hand, argues that the Agreement also requires the employer to adhere to the pro-

visions of FECA and to promulgate binding regulations which comply with that act. Article 21.4 states:

> Employees covered by this Agreement shall be covered by subchapter 1 of Chapter 81 of Title 5, and any amendments thereto, relating to compensation for work injuries. The employer will promulgate appropriate regulations which comply with applicable regulations of the Office of Workers' Compensation Programs and any amendments thereto.

The employer's regulations promulgated pursuant to Article 21 of the Agreement are included in Part 540, Injury Compensation Program, of the Postal Service Employee and Labor Relations Manual (ELM). After declaring that the "USPS has legal responsibilities to employees with job-related disabilities under 5 USC 8151 and the Office of Personnel Management's regulations," section 546 of Part 540, Reemployment of Employees Injured on Duty, states:

> When an employee fully overcomes the injury or disability within one year after the commencement of compensation payments from OWCP . . . the USPS must give an employee the right to resume employment in the former or equivalent position.

The union contends that while article 21 requires these provisions, article 19 also incorporates them by reference into the National Agreement. Article 19 states:

> Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours, or working conditions . . . shall contain nothing that conflicts with this Agreement.[2]

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[2] Although article 19 states that nothing in the handbooks, manuals and regulations shall conflict with the Agreement, it does not specifically state that the Agreement incorporates these texts. Thomas A. Neill, Director of Industrial Relations for the APWU, whose duties include negotiation of the National Agreement and administration of the grievance procedure, states in his "declara-

The Postal Service acknowledges that FECA applies to probationary employees and that when such employees suffer a work-related injury and are discharged because of that injury they have a right to request reinstatement when they recover. *See* 5 U.S.C. § 8151(b)(1). To enforce such rights, however, probationary employees, argues the Postal Service, have recourse to the Merit System Protection Board (MSPB), *see* 5 C.F.R. § 353.401, but not, under the terms of the National Agreement, to arbitration.

III

We agree with the Postal Service that even when, as in this case, a probationary employee alleges that his termination violates articles 19 and 21 of the National Agreement, article 12 of that Agreement clearly denies probationary employees any right to resort to grievance and arbitration procedures. Non-probationary (permanent) employees alleging similar violations clearly have recourse to arbitration, but the Agreement expressly denies probationary employees that right. Such is the Agreement for which the parties bargained.

The language of article 12 is, as the district court declared, "clear and unequivocal": "The Employer shall have the right to separate from its employ any probationary employee at any time during the probationary period and these probationary employees shall not be permitted access to the grievance procedure in relation thereto." Articles 19 and 21 grant, as the arbitrator found, all employees, both probationary and permanent, certain rights and benefits. In so finding, the arbitrator, as the district court stated, merely determined that a proba-

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tion" that "[t]he handbooks and manuals are applied in labor relations between the APWU and USPS as part of the National Agreement." These texts, Neill adds, are incorporated by reference into the Agreement and arbitrators routinely interpret them in deciding grievance arbitration cases. The Postal Service does not dispute Neill's sworn declaration.

tionary employee can assert rights pursuant to section 546 of the ELM. He did not expressly find, nor could he have found, that articles 19 and 21 confer on probationary employees the right to arbitration on issues concerning these articles that article 12 expressly denies them. *See American Postal Workers Union v. United States Postal Service*, C.A. No. 85-2154, slip opinion (D.D.C. Nov. 27, 1989) (although article 2 of National Agreement expressly requires arbitration of disputes arising under that article, probationary employees have no recourse to arbitration because article 12 denies them that right). When a specific and a general provision of an agreement conflict, well-established principles of construction require that the specific trump the general provision.[3] We follow that principle here.

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[3] Had the parties to the Agreement intended to confer on probationary employees the right to arbitrate matters concerning compensable leave, they could have specifically included that right. Given the presence at the bargaining table of union negotiators possessing the experience and knowledge of Thomas A. Neill, the Director of Industrial Relations for the APWU, the express and unambiguous exclusion in article 12 of probationary employees from the grievance procedure and, therefore, from arbitration suggests that the parties anticipated that a probationary employee's termination which is causally connected to his compensable injury would not be a subject for arbitration. *See American Postal Workers Union, AFL-CIO v. United States Postal Service*, C.A. No. 85-2154, slip opinion (D.D.C. November 27, 1989) (although article 2 of National Agreement expressly requires arbitration of disputes arising under that article, probationary employees have no recourse to arbitration because article 12 denies them that right). To argue otherwise is disingenuous.

Neill administers the grievance procedure. He is "responsible for disseminating information and directions to APWU officers nationwide concerning the National Agreement, its meaning, and its application." As director he has reviewed "thousands of arbitration awards in cases arbitrated under the National Agreement." Before becoming director, Neill was a local and then a national officer of the union and handled "thousands of grievances filed under the National Agreement" in Texas and Louisiana.

The same principle of construction also applies to the conflict between article 12 and article 15.A.4.9, which states that the arbitrator's decisions as to arbitrability are final and binding. Article 12 does not permit the arbitrator ever to reach the question of arbitrability when the dismissal at issue involves probationary employees. When the arbitrator does so, he clearly exceeds his authority under the National Agreement.

The union insists that a probationary employee dismissed while on compensable leave is not a probationary employee. We disagree. Leave for injury suspends the running of the clock on a probationary period, but it does not alter the employee's status as a probationary employee. His sufferings do not apotheosize his probationary status into a more desirable one. Indeed, in ruling that Smith should return as a probationary employee, the arbitrator acknowledged, at least inferentially, that the employee is still on probationary status.

We note that to deny a probationary employee the right to arbitration after he is dismissed during compensable leave is not to deprive him of all remedies for not being reinstated after recovering from compensable injury. If he can show that his firing resulted from a compensable injury or was substantially related to one, a probationary employee is entitled to appeal a denial of reinstatement to the MSPB. *Roche v. United States Postal Serv.*, 828 F.2d 1555, 1557 (Fed.Cir.1987); *see also Rishavy v. United States Postal Serv.*, 35 M.S.P.R. 528 (1987).

Our decision does not conflict with those decisions which hold, *Rishavy*, 35 M.S.P.R. 528 (Nov. 19, 1987), or imply, *see Roche*, 828 F.2d 1555 (Fed.Cir.1987), that probationary status has no bearing on an employee's restoration rights. In both *Roche* and *Rishavy* the employees successfully argued that their probationary status did not curtail their right to appeal to the Merit System Protection Board the Postal Service's denial of restoration

rights after they had recovered from compensable injuries. Neither of these cases, however, sheds any light on the issue of arbitrability which confronts this court. These decisions merely indicate that a probationary employee terminated because of a compensable injury is not bereft of a remedy for an infringement of a statutory right.

IV

In conclusion, we agree with the district court that Smith was a probationary employee and that under article 12 of the National Agreement, a probationary employee is not permitted access to the grievance procedure in relation to a termination within the probationary period, and thus is not entitled to arbitration. Consequently, in ordering Smith reinstated as a probationary employee, the arbitrator exceeded his authority under the clear and unequivocal language of the National Agreement. The decision of the district court is, therefore, AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4-89-87-E

UNITED STATES POSTAL SERVICE,
Washington, D.C. 20260

vs.

AMERICAN POSTAL WORKERS UNION, AFL-CIO

ORDER

[Filed May 16, 1990]

This action arises out of an arbitration award to reinstate a postal employee. The United States Postal Service ("USPS") brought this suit to set aside the arbitration award because the arbitrator exceeded his authority. The American Postal Workers Union, AFL-CIO ("APWU") is the representative for postal employees and has filed a counterclaim to enforce the award. The case is now before the Court on the parties' cross motions for summary judgment.

FACTUAL BACKGROUND

The Postal employee involved is Darel A. Smith, a former distribution clerk at the Fort Worth, Texas Post Office. Smith was hired on March 15, 1986. On April 26, 1986, Smith sustained a work-related injury and was placed on compensable leave. On May 15, 1986, Smith was terminated from his employment. The APWU then

filed a grievance pursuant to the collective bargaining agreement in effect at the time, referred to as the "National Agreement," contesting Smith's termination. The APWU contended that Smith was terminated because of his work related injury in violation of Section 546, Part 540 of the Employee and Labor Relations Manual ("ELM"), which is incorporated into the National Agreement. The USPS challenged the arbitration on the basis that the arbitrator did not have jurisdiction and, alternatively, Smith's discharge was for unsatisfactory performance, unrelated to his injury.

DISCUSSION

The first issue is whether the arbitrator exceeded his authority. *See*, 9 U.S.C. § 10. The authority of an arbitrator is derived from the contract itself. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). Therefore, the Court must look to the National Agreement to determine the scope of the arbitrator's authority as agreed to by the parties. Article 12, Section 1.A. provides in part:

> The probationary period for a new employee shall be ninety (90) calendar days. The Employer shall have the right to separate from its employ any probationary employee at any time during the probationary period and these *probationary employees shall not be permitted access to the grievance procedure in relation thereto.*

Because Smith was terminated while he was a probationary employee, plaintiff argues, he was not entitled to the grievance procedure through arbitration. Hence, the arbitrator lacked jurisdiction and exceeded his authority over the dispute.

However, defendant argues that the issue of arbitrability was determined by the arbitrator as provided for in the agreement. That determination, defendant argues,

is final and not subject to judicial review. Article 15, Section 4.A.(9) provides in part:

> Any dispute as to arbitrability may be submitted to the arbitrator and be determined by such arbitrator. The arbitrator's determination shall be final and binding.

The arbitrator's award listed the issues as follows:

1. Whether the instant grievance is arbitrable?

2. Whether the grievant's termination violated the National Agreement and/or federal law, and if so, what is the remedy?

Although the arbitrator never expressly held whether the grievance was arbitrable, he nevertheless proceeded to make a determination on the merits. It appears from the award as though the arbitrator merely determined that a probationary employee could assert rights pursuant to Section 546 of the ELM. Once he determined that a probationary employee could assert such rights, he addressed the second issue of whether there was a violation under Section 546.

Although the arbitrator may have implicitly considered the issue of arbitrability, his determination is not absolutely immune from judicial review as defendants suggest. If the arbitrator exceeded his authority under the collective bargaining agreement, the Court may set aside the award. *Container Products v. United Steelworkers*, 873 F.2d 818, 820 (5th Cir. 1989). The essential facts in this case are not in dispute. At the time of his termination, Smith was a probationary employee. Under the clear language of the National Agreement, probationary employees are not permitted access to the grievance procedure in relation to a termination within the probationary period. Article 12, Section 1.A. The arbitrator clearly exceeded his authority under the clear and unequivocal language of the collective bargaining agreement.

Accordingly, it is hereby ORDERED that plaintiff's motion for summary judgment is GRANTED, defend-

ants' motion is DISMISSED, and the award of arbitration is hereby VACATED. A judgment consistent with this order shall be rendered herewith.

Signed this 16th day of May, 1990.

/s/ Eldon B. Mahon
ELDON B. MAHON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4-89-87-E

UNITED STATES POSTAL SERVICE,
Washington, D.C. 20260

vs.

AMERICAN POSTAL WORKERS UNION, AFL-CIO

JUDGMENT

[Filed May 16, 1990]

This action came on for decision on cross-motions for summary judgment before the Court, Honorable Eldon B. Mahon, U.S. District Judge, presiding, and the issues having been duly considered and an opinion having been rendered, it is ORDERED and ADJUDGED that plaintiff's motion for summary judgment is GRANTED, defendants' motion is DISMISSED, and the award of arbitration is VACATED.

Entered this 16th day of May, 1990.

/s/ Eldon B. Mahon
ELDON B. MAHON
United States District Judge

REGULAR ARBITRATION PANEL

GRIEVANT: D. Smith
POST OFFICE: Ft. Worth, TX
CASE NO: S4C-3A-C-36259

IN THE MATTER OF THE ARBITRATION BETWEEN
UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL WORKERS UNION, AFL-CIO

Before: JAMES J. SHERMAN, ARBITRATOR

APPEARANCES:

For the U.S. Postal Service:
Bill Jackson
Labor Relations Representative

For the Union:
Bobby Kennedy
National Business Agent

Place of Hearing: MPO, Ft. Worth, Texas

Date of Hearing: October 5, 1988

AWARD: The grievance is sustained. The Postal Service is directed to reinstate the grievant to his position as a probationary employee, Distribution Clerk-Manual, and (counting the time he has already worked) to afford him the remainder of his probationary period to qualify as a permanent employee. In addition, he must be made whole for all financial loss. The Arbitrator shall retain jurisdiction to resolve any dispute as to the remedy.

Date of Award: October 24, 1988

/s/ James J. Sherman
JAMES J. SHERMAN
Arbitrator

ISSUE

1. Whether the instant grievance is arbitrable?
2. Whether the grievant's termination violated the National Agreement and/or federal law, and if so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 3—Management Rights

ARTICLE 12—Principles of Seniority, Posting and Reassignments

ARTICLE 15—Grievance-Arbitration Procedure

ARTICLE 16—Discipline Procedure

ARTICLE 19—Handbooks and Manuals

FACTS

There is agreement on most of the essential facts. The grievant was hired March 15, 1986 as a Distribution Clerk-Manual, and was assigned to the Downtown Postal Facility. On April 13, 1986, he received a 30 day evaluation which is customary for employees on (90 day) probation. In this evaluation he was rated as follows:

Factor A: Attendance/Punctuality: does not meet expectations at this time

Factor B: Following Directions: meets or exceeds expectation at this time

Factor C: Compliance with Regulations (safety, dress/footwear, conduct): does not meet expectations at this time.

Factor D: Task Performance: Does not meet expectations at this time.

Factor E: Job Knowledge: does not meet expectations at this time.

In addition the supervisor, Tommy Baker, made the following observation:

> Mr. Smith does not meet expectations at this time. He has been regular in attendance but two hours late on one occasion. He follows all directions given and complies with regulations. He dresses adequately but does not present a professional appearance in his jogging suits. His task performance is well below expectations. He is very slow casing box mail and his error rate is high. Mr. Smith has been assigned the 76104 scheme and will begin scheme training 4-16-86.

It should be mentioned that the supervisor, Tommy Baker, had three options in the "Overall Rating:" 1. Meets or exceeds expectations, 2. Does not fully meet expectation at this time, or 3. Fails to meet expectation: Separation Recommended. And he did not check box number 3.

On April 13, 1986, the grievant was assigned to scheme training which was to commence and did commence on April 16, 1986. However, on April 26, 1986, he was involved in an auto accident related to work, was injured, and he was placed on compensable leave.

On May 15, 1986, the grievant's employment was terminated. The reason for the termination was explained in a letter dated May 15, 1986 as follows:

> This is official notice that you will be separated from the Postal Service at the end of your tour of duty on the day you receive this memorandum. This termination of your employment is due to your unsatisfactory performance as a Postal employee.

The instant grievance protests the grievant's termination as being in violation of both the National Agreement and federal law.

POSITION OF THE UNION

The Union appreciates that the grievant was a probationary employee at the time of his termination and was, therefore, not entitled to all of the rights enjoyed by employees who hold seniority. However, he was entitled to the rights provided by the Postal regulations and the rights provided by law. These rights include protection against termination when the termination was the result of a compensable injury. And the evidence indicates that the grievant, in all probability, would have completed his period of probation and become a career Postal employee but for the auto accident which was clearly not his fault. Finally, the Union contends that the grievant did complete his period of probation because according to the Postal regulations, time recorded as compensable leave time is counted as time on the active roll. Accordingly, he should be reinstated with full seniority status, and compensated for all lost wages.

POSITION OF THE POSTAL SERVICE

The Postal Service contends that the instant grievance should be dismissed as not a proper subject for arbitration. It supports this position by pointing to the clear contract language and to the evidence presented at the hearing. To be more specific, Article 12 provides:

> PRINCIPLES OF SENIORITY, POSTING AND REASSIGNMENTS
>
> Section 1. Probationary Period
>
> A. The probationary period for a new employee shall be ninety (90) calendar days. The Employer shall have the right to separate from its employ any probationary employee at any time during the probationary period and these probationary employees shall not be permitted access to the grievance procedure in relation thereto. . . .

The evidence shows that the grievant was hired March 15, 1986 and on his 30 day evaluation was rated unsatisfactory in four of the five factors subject to evaluation. Clearly, management had every reason and every right to terminate the grievant's employment at this time. But management, generously, decided to give the grievant more time to correct his deficiences. As Supervisor Baker explained, he planned to terminate the grievant's employment at the time of the 60 day evaluation unless the grievant showed significant improvement prior to that time. However, the grievant's conduct immediately following the 30 day evaluation convinced management that he would not or could not meet reasonable standards of behavior. To be precise in a memo dated April 19, 1986 from Supervisor Baker to C. Haynes, Mr. Baker requested that the grievant be terminated immediately. The memo states:

> Request an immediate termination of PTF Clerk D. A. Smith for failure to follow the instructions of his supervisor. On 4-13-86 I instructed Mr. Smith to report to the GMF (PEDC) on 4/16/86 at 2200 for scheme training orientation. He was told to report to the downtown station after completing the scheme training orientation and work for a total of four hours. (two hours orientation and two hours of box mail distribution.) On 4-16-86 Mr. Smith worked only two hours. He ended tour at the GMF after orientation. On 4-17-86 Smith worked 4.09 hours. This was Mr. Smith's scheduled day off. He was not instructed, or given permission to work on 4/17/86.

Before this memo could be acted upon, the grievant became involved in an auto accident, on April 26, 1986, was injured and was off on compensable leave. However, on May 16, 1986, Supervisor Baker prepared a 60 day evaluation of the grievant's performance and gave him a rating of "Fails to Meet Expectations: Separation

recommended. He also provided the following explanatory comments:

> Mr. Smith fails to meet expectations and separation is recommended for; making excessive errors on the box line, failure to follow the specific instructions of his supervisor, and failure to adhere to the posted duty schedule. On 4-13-86 Mr. Smith was informed that his error rate casing box mail was unacceptable. On 4-19-86 he was given a case check. Some of the errors found were: misboxed mail, mail boxed for a previous boxholder when there were specific instruction to verify the mail, and mail received without a box number placed in the wrong box. On 4-22-86 Mr. Smith was given another case check. He was only casing 90% correctly. On 4-13-86 Mr. Smith was instructed to report to the GMF (PEDC) on 4-16-86 at 2200 for scheme training orientation. He was also told to report to the downtown station after completing the orientation and work for at least an additional 2 hours for a combined total of 4 hours. On 4-16-86 Mr. Smith worked only two hours. He ended tour at the GMF after scheme training orientation and did not report for duty at the downtown station as instructed. On 4-17-86 Mr. Smith worked for 4.09 hours on his scheduled off day. He was not instructed to, or given permission to, work on 4-17-86.

Finally, it should be noted that after preparing the 60 day evaluation and the removal notice, management attempted to inform the grievant of its decision to terminate his employment. But the telephone number which he provided to management was disconnected. And when management attempted to deliver the removal notice to the address which the grievant provided, the residence was not occupied. Hence, management had to wait until the grievant showed up to get his check to issue the removal notice.

DISCUSSION AND OPINION

There can be no serious question about the right of the Postal Service to issue a removal notice anytime within the first 90 days of a person's employment. That is to say, management may make this decision and take this action without having to prove that it had "just cause" as this term is used in Articles 3 and 16. However, as the Union pointed out, Postal regulations (ELRM § 546, entitled "Reemployment of Employees Injured On Duty," provides as follows:

> 546.1 Law
>
> .11 General. The USPS has legal responsibility to employees with job-related disabilities under 5 U.S.C. 8151 and the Office of Personnel Management's (OPM) regulations, as outlined below.
>
> .12 Disability Fully Overcome Within 1 Year
>
> .121 Obligation. When the injury or disability is fully overcome within one year after the commencement of compensation payments from OWCP, or after compensable disability recurs, the USPS must give an employee the right to resume employment in in the former or equivalent position.
>
> .122 Rights and Benefits. Upon reemployment, all rights and benefits which an employee would have had or acquired in the former position, had there been no injury or disability, must be restored.

Management contends that the above described rights protect the employment of a person who has completed a probationary period and currently enjoys the status of a permanent employee with all the rights which seniority provides. However, the regulation does not support this contention by management: it makes no distinction between a permanent employee and one that is on probation. Furthermore, the evidence presented by the Union

indicates that a Federal Circuit Court has recently ruled that employees are entitled to these statutory restoration rights irrespective of their probationary status. See *Roche v. USPS*, 828 F.2d. 1555 (Fed. Cir. 1987).

As a back-up contention, management asserted that the regulation's protection extended only to employees who had been discharged because of their absence on compensable leave. The Arbitrator appreciates the logic of this contention. But according to the Roche decision (supra) the protection is broader than this: the employee is entitled to reinstatement if he/she is able to show that his removal was the result of, *or substantially related to*, the compensable injury.

The Arbitrator is not completely comfortable with the role he is forced to assume in this instance for several reasons. First, he is not certain to what extent he is legally obligated to follow precedent established in the Merit Service Protection Board jurisdiction. Indeed, the law is unsettled on this point. Secondly, since he received in evidence only one Merit Service Protection Board case, he is less than completely convinced that this one case represents the majority opinion on this important issue. Third, it appears that the Roche decision calls for a resolution of the issue: whether the grievant's discharge was ". . . substantially related to, the compensable injury. . . ." And the term used by the Court "substantially related to" is anything but precise.

In the absence of any evidence bearing upon the legislative intent underlying this imprecise term, the Arbitrator concluded that it means, in essence, that the employee should be reinstated unless it can be said with reasonable assurance that the absence had nothing whatever to do with management's decision to initiate the removal action.

Does the evidence presented by management meet this test? The Arbitrator does not believe it does. To explain,

everyone agreed that the grievant's 30 day evaluation was less than satisfactory and that he could have been discharged at that time with no contractual entanglements. But the fact is, he was not discharged. So, it must be assumed that management held out hope that he would respond to training and indoctrination.

Thereafter, according to certain testimony and a supporting document, Supervisor Baker recommended to his superior that the grievant be discharged immediately. Obviously, management had no need to wait any longer if it was convinced that the grievant could not or would not meet its standards of performance. That is, there was no need to wait until the customary 60 day evaluation; management could have simply issued a removal notice and called for a replacement. But no one acted upon Supervisor Baker's recommendation. So, it must be assumed that the decision had not been made, namely, that the grievant was unwilling or unable to make the necessary improvement. Parenthetically, the Union's advocate expressed an opinion which was not refuted and which seemed quite logical. He said that it is almost routine to give probationary employees unsatisfactory ratings in order to motivate them and to convince them that management's standards are high. He also stated that employees generally take this message seriously and work hard to satisfactorily complete the probationary period. The point is, perhaps the grievant was not as unacceptable as the 30 day evaluation would imply. And perhaps, he was trying to meet management's standards of performance but was unable to demonstrate this because he was absent due to the compensable injury. If this was the case, it would be reasonable to say that his discharge was "the result of or substantially related to the compensable injury," as these words are used in the Roche decision.

The Union requested as a remedy that the grievant be, not only reinstated to his former status, but also awarded

a permanent position. In support of this request, it pointed to the postal regulations (ELRM 377.2) entitled "How to Count Probationary Service." This section mandates that "Periods of absence during which an employee is carried on the rolls are counted toward completion of the probationary period." And it pointed out that an employee on compensable leave is carried on the rolls. The Arbitrator did not have access to the entire applicable regulations. However, based upon the provisions which were presented in evidence, there appears to be no support for the Union's position in this respect. To explain, Section 377.2 of the ELRM sets forth various types of situations wherein employees should receive credit toward their probationary period (for example, a period of military service) but there is no specific reference to compensable leave.

In conclusion, the Arbitrator has no choice but to sustain the grievance. The grievant met the criteria described in 5 U.S.C. § 8151 and O.P.M. regulations. That is, he received an on-the-job injury which resulted in a period of absence on compensable leave and he recovered from this injury and was able to return to work (within the statutory period of one year) on May 18, 1986. Moreover, as previously explained, the Arbitrator concluded that his separation was "the result of, or substantially related to, the compensable injury." Finally, it should be noted that the instant case closely parallels the facts in a recent M.S.P.B. decision (*Rischavy v. U.S.P.S.*, 35 MSPR 528 [1978]) and the Arbitrator's interpretation of the law and regulations appears to be consistent with the rational in this M.S.P.B. decision.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1562

UNITED STATES POSTAL SERVICE,
Plaintiff-Appellee,

versus

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

(February 26, 1991)

Before SMITH and WIENER, Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

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*Judge Thomas Gibbs Gee was a member of the original panel but resigned from the Court on February 1, 1991 and, therefore did not participate in this decision. This matter is being decided by quorum. 28 U.S.C. 46(d).

STATUTES AND REGULATIONS
LABOR MANAGEMENT RELATIONS ACT

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * * *

POSTAL REORGANIZATION ACT

§ 1208. Suits

* * * *

(b) Suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy.

CBA PROVISIONS

NATIONAL AGREEMENT

* * * *

ARTICLE 12

PRINCIPLES OF SENIORITY, POSTING AND REASSIGNMENTS

Section 1. Probationary Period

A. The probationary period for a new employee shall be ninety (90) calendar days. The Employer shall have the right to separate from its employ any probationary employee at any time during the probationary period and these probationary employees shall not be permitted access to the grievance procedure in relation thereto. If the Employer intends to separate an employee during the probationary period for scheme failure, the employee shall be given at least seven (7) days advance notice of such intent to separate the employee. If the employee qualifies on the scheme within the notice period, the employee will not be separated for prior scheme failure.

* * * *

ARTICLE 15

GRIEVANCE-ARBITRATION PROCEDURE

Section 1. Definition

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Unions which involves the interpretation, application of, or compliance with the provisions of this

Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

* * * *

Section 4. Arbitration

A. General Provisions

* * * *

(6) All decisions of an arbitrator will be final and binding. All decisions of arbitrators shall be limited to the terms and provisions of this Agreement, and in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator. Unless otherwise provided in this Article, all costs, fees, and expenses charged by an arbitrator will be shared equally by the parties.

* * * *

(9) In any arbitration proceeding in which a Union feels that its interests may be affected, it shall be entitled to intervene and participate in such arbitration proceeding, but it shall be required to share the cost of such arbitration equally with any or all other Union parties to such proceeding. Any dispute as to arbitrability may be submitted to the arbitrator and be determined by such arbitrator. The arbitrator's determination shall be final and binding.

* * * *

ARTICLE 19

HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this

Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

* * * *

ARTICLE 21

BENEFIT PLANS

* * * *

Section 4. Injury Compensation

Employees covered by this Agreement shall be covered by subchapter I of Chapter 81 of Title 5, and any amendments thereto, relating to compensation for work injuries. The Employer will promulgate appropriate regulations which comply with applicable regulations of the Office of Workers' Compensation Programs and any amendments thereto.

* * * *

EMPLOYEE AND LABOR RELATIONS MANUAL

545.91 General. An employee who suffers job-related injury or illness for which OWCP compensation is being received should be granted LWOP/IOD for an initial period of up to 1 year from the date OWCP compensation began.

545.92 Extensions. If the employee is unable to return to work at the end of the 1 year period on LWOP/IOD, the LWOP/IOD may be extended for successive additional periods of up to 6 months. Extensions are granted only if it appears that the employee is likely to return to work within the period of the extension.

545.93 Separations. If it is not likely that the employee will be able to return to work at the end of 1 year of LWOP/IOD or during the authorized extended period, the employee may be separated. Before any employee

who is on the rolls of the OWCP can be separated, the postal official must submit a comprehensive report to the Director, Office of Safety & Health, at Headquarters with appropriate recommendations and all the documentation needed to support the recommendations. The employee must be retained on the rolls of the Postal Service pending a decision.

* * * *

546.121 Obligation. When an employee fully overcomes the injury or disability within 1 year after the commencement of compensation payments from OWCP, or after compensable disability recurs, the USPS must give an employee the right to resume employment in the former or equivalent position.

546.122 Rights and Benefits. Upon reemployment, all rights and benefits which an employee would have had or acquired in the former position had there been no injury or disability, must be restored.